No. 06-

IN THE

Supreme Court of the United States

EUSEBIO GUEVARA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the statutory and regulatory regime under which the Department of Justice adjudicates removal cases, Immigration Judges ("IJs") are responsible, in the first instance, for determining whether an alien is removable from the United States—and, if so, whether any relief from removal is appropriate. The Board of Immigration Appeals ("BIA"), an administrative appellate body, reviews IJs' orders; such BIA review is a prerequisite to an alien seeking judicial review of a removal decision in an Article III court.

It is common ground among the U.S. Courts of Appeals that, where an IJ has ordered that an alien be removed from the United States after (i) determining that the alien is removable and (ii) denying all relief from removal, the BIA has the power to order the alien removed by simply affirming the IJ's order. The question presented in this case involves the BIA's power to order removal when it *disagrees* with an IJ's grant of relief from removal:

Whether, where an IJ has (i) determined that an alien is removable but (ii) granted relief from removal, and on appeal the BIA reverses the grant of relief from removal, the BIA may itself order an alien removed, or instead, must remand the matter to the IJ for entry of an order that the alien be removed.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to this case before the IJ and BIA were petitioner Eusebio Guevara, an individual, and Alberto R. Gonzales, the Attorney General of the United States, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Eusebio Guevara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the IJ (Pet. App. 12a) and the decision of the BIA (Pet. App. 9a) are both unpublished.

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 8, 2007, and is reported at 472 F.3d 972. (Pet. App. 1a.)

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 8, 2007. (Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 8 of the United States Code, Section 1101(a)(47), provides:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA].

Title 8 of the Code of Federal Regulations, Section 1003.1(d)(1)(i), provides, in pertinent part:

> Powers of the Board—Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. . . . The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures[.]

STATEMENT

Under the Immigration and Naturalization Act ("INA"), an alien may only be removed from the United States when a valid "order of deportation" has been entered against the alien.[1] The opinion below is the latest in a series of conflicting decisions of the Courts of Appeals on the issue of the proper procedure where an IJ has found an alien removable but granted the alien relief from removal, and the BIA affirms the finding of removability but reverses the grant of relief. The question on which the courts differ is whether in that instance the BIA has the power to itself order the alien removed, or instead, must remand the matter to the IJ for further consideration or for entry of an order that the alien be removed. The conflict implicates the relative

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[1] Due to the extensive changes to the Immigration Code in recent years, two terminology points bear highlighting. *First*, the current terms "removal" and "removable" are synonymous with the archaic terms "deportation" and "deportable"; thus a removal order in current parlance is the functional equivalent of an order of deportation, which still appears in some statutes and regulations. *See* 8 U.S.C. § 1229a(e)(2)(B); *Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004), *cert. denied*, 543 U.S. 1145 (2005); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 11-12 (3d Cir. 2003). *Second*, an IJ is the current term for what some anachronistic statutes and regulations still refer to as a "special inquiry officer." *See* 8 C.F.R. § 1.1(*l*) (1996); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883 n.7 (9th Cir. 2003).

institutional competence of IJs (who act as trial judges under the statutory and regulatory scheme of the INA), and the BIA (which acts as an appellate body), to order an alien removed from the country. The question turns on the meaning of the statutory term "order of deportation."

The Ninth Circuit, the first Court of Appeals to address the question, ruled that only an IJ may order an alien removed. In parsing the relevant statutes and regulations, that court concluded that an IJ's finding that an alien is removable does not meet the statutory definition of an "order of deportation." Accordingly, where an IJ has found an alien removable, but has also granted relief from removal—and thus, not ordered the alien removed—the Ninth Circuit requires the BIA to remand the case to the IJ for further consideration and an entry of an "order of deportation" in the event that the BIA affirms the finding of removability but reverses the grant of relief. The court reasoned that as an appellate body, the BIA simply lacks the power to enter such an order in the first instance.

In contrast, in this case, the Seventh Circuit—joining the Second, Fifth, and Eighth Circuits, but in acknowledged conflict with the Ninth Circuit—held that where an IJ has found an alien removable, that finding itself constitutes an "order of deportation." That is so, the court ruled, even if the IJ did not actually order the alien removed, but instead, granted relief from removal. From there, the court reasoned that by affirming the finding of removability, while reversing the grant of relief from removal, the BIA in effect affirms an "order of deportation," and can thereby order the alien removed of its own power, without the need for a remand. (Pet. App. 7a-8a.) In other words, the Seventh Circuit ruled that the BIA was itself "empowered to order [an alien] removed . . . ." (*Id.* at 8a.)

A. The Applicable Statutory and Regulatory Framework.

An alien who has lawfully entered the United States may only be forced to leave pursuant to removal proceedings. U.S. Dep't of Justice, Executive Office for Immigration Review, Types of Immigration Court Proceedings and Removal Hearing Process, Fact Sheet (July 28, 2004), *available at* http:// www.usdoj.gov/eoir/press/04/ ImmigrationProceedingsFactSheet2004.pdf (last visited April 6, 2007) [hereinafter "Removal Hearing Fact Sheet"], at 1 ("[T]he removal proceeding is now generally the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal."). "Removal 'visits a great hardship on the individual and deprives him [or her] of the right to stay and live and work in this land of freedom.' It is 'a drastic measure' and for some 'the equivalent of banishment or exile.'" *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) and *Jordan v. De George*, 341 U.S. 223, 231 (1951)).

Consistent with the gravity of removal proceedings, the U.S. Department of Justice has divided responsibility for adjudicating them between two principal Article II decision makers: IJs and the BIA. *See Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). These two decision-makers operate within distinct spheres of competence: The IJ acts as a trial judge, deciding matters in the first instance, while the BIA acts as an appellate body, reviewing the decisions of IJs.

1. Removal Proceedings Before an IJ.

IJs adjudicate removal proceedings in the first instance. 8 U.S.C. § 1229a; *see id.* § 1229a(a)(1) ("An [IJ] shall conduct proceedings to decide the inadmissibility or deportability of an alien."); 8 C.F.R. § 1240.1(a); *id.* § 1003.10 ("[IJ]s . . . shall exercise the powers and duties in this chapter regarding the conduct of . . . removal[.]").

Removal proceedings are commenced with a notice to appear, a charging document that invokes the power of the immigration court to determine whether an alien is removable. 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1239.10. Thereafter, the IJ acts essentially as a trial judge presiding over the removal proceedings. The IJ "administer[s] oaths, receive[s] evidence, and interrogate[s], examine[s], and cross-examine[s] the alien and any witnesses"; may "issue subpoenas for the attendance of witnesses and presentation of evidence"; and even has "authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority[.]" 8 U.S.C. § 1229a(b)(1).

"Removal proceedings generally require an [IJ] to make two findings: (1) a determination of the alien's removability from the United States, and (2) thereafter deciding whether the alien is eligible for a form of relief from removal." Removal Hearing Fact Sheet at 2.

First, an IJ must "[d]etermine removability." 8 C.F.R. § 1240.1(a)(i); *see* 8 U.S.C. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the [IJ] shall decide whether an alien is removable from the United States. The determination of the [IJ] shall be based only on the evidence produced at the hearing."). The government bears the burden of proof on this inquiry. *Id.* § 1229a(c)(3)(A). In practice, though, this determination is commonly made, or even conceded, at an early proceeding before an IJ. *See* 8 C.F.R. § 1240.48(b) ("If the respondent admits the factual allegations and admits his or her deportability under the charges and the [IJ] is satisfied that no issues of law or fact remain, the [IJ] may determine that deportability as charged has been established by the admissions of the respondent."); Sydenham B. Alexander III, *The Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 5 (2006) [hereinafter "*Political Response*"] ("Only a small portion of immigration court cases turn on contested questions of

removability. . . ."). A finding of removability is a prerequisite to an IJ's consideration of any kind of relief from removal. *See* 8 U.S.C. § 1229a(c)(3), (4).

Second, if the IJ determines that an alien is removable, he must decide whether the alien should be granted relief from removal. This question is the focal point of most removal cases. *Political Response* at 5 ("In the vast majority of immigration court cases, . . . noncitizens concede that they are removable and seek to prevail at the second legal stage by showing that the law entitles them to relief."). Such relief can take various forms, including asylum (8 U.S.C. § 1158(a)), cancellation of removal (*id.* § 1229b(a)), withholding of removal (*id.* § 1231(b)(3)), protection under the Convention Against Torture (8 C.F.R. §§ 1208.16-1208.17), or adjustment of status (8 U.S.C. § 1255). The alien bears the burden on the relief inquiry. 8 C.F.R. § 1240.8(d). Often, the finding of removability will be made at a preliminary hearing before the merits hearing on alien's claim for relief from removal; indeed, an alien's request(s) for relief from removal are commonly not decided until months following a threshold determination of removability. *See, e.g.*, *Ly v. Hansen*, 351 F.3d 263, 265-66 (6th Cir. 2003) ("At the September 21, 1999 hearing, the immigration judge found that Ly was removable. Ly then filed applications for relief from deportation on various grounds . . . . The immigration judge set a merits hearing for Ly's other applications for relief for March 16, 2000[.]"); Pet. App. 8a (acknowledging that concluding that an alien is deportable is a "threshold determination"); *see also Introduction To Practice Before The Executive Office Of Immigration Review*, SJ080 ALI-ABA 213, 218 (2004) (noting that a request for relief from removal generally requires a "separate 'merits' hearing").

Based on the evidence adduced in proceedings before the IJ, the IJ may enter an "order[] of removal." 8 C.F.R. § 1240.1(a)(1)(i); *id.* § 1240.12(c) (granting the IJ the power to "direct [an alien's] removal"). This order is also known as

an "order of deportation." *E.g.*, *id.* § 1240.50(c) ("The order of the [IJ] shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the [IJ] shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed."). "Order of deportation," in turn, is defined by statute to mean: "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). "If the [IJ] decides that the alien is removable and orders the alien to be removed, the [IJ] [must] inform the alien of," among other things, "the right to appeal that decision . . . ." *Id.* § 1229a(c)(5); 8 C.F.R. § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . .").

2. Review of an IJ's Decision by the BIA.

Agency review of an IJ's decision in removal proceedings is available in, and delegated to, the BIA. The BIA is "an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it." 8 C.F.R. § 1003.1(d)(1)(i). By regulation, those decisions include "[d]ecisions of [IJs] in removal proceedings." *Id.* § 1003.1(b)(3).

When reviewing an IJ's decision, the BIA functions much like any other appellate body. It may take judicial notice, but otherwise may not find facts. 8 C.F.R. § 1003.1(d)(3)(iv) ("Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding

must file a motion for remand."). It may review an IJ's findings of fact, "including findings as to the credibility of testimony," but "only to determine whether the findings of the [IJ] are clearly erroneous." *Id.* § 1003.1(d)(3)(i). Other standards of review are specified by regulation as well. *Id.* § 1003.1(d)(3)(ii).

Where an alien appeals an "order of deportation" to the BIA, and there is "a determination by the Board of Immigration Appeals affirming such order," the order of deportation is considered "final." 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1241.1(a). At that point, an alien may seek review of the BIA's decision by way of a petition for review to an Article III court—and specifically, a U.S. Court of Appeals. 8 U.S.C. § 1252(a)(1). If, however, an "order of deportation" is issued by an IJ, but not appealed to the BIA within 30 days, it also becomes "final"— with starkly different consequences. *Id.* § 1101(a)(47)(B)(ii); 8 C.F.R. § 1003.39; *id.* § 1241.1(c). At that point, the alien has forfeited all review as of right: any appeal to the BIA would be untimely, *see* 8 C.F.R. § 1003.38(b); *id.* § 1003.3(a)(1), and the federal courts may not hear a petition for review if all administrative remedies were not exhausted, 8 U.S.C. § 1252(d)(1).

3. Removal of an Alien.

By statute, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). The finality of the "order of deportation"/"order of removal" is crucial in determining when this deadline occurs. Specifically, the 90-day "removal period" runs from the latest of:

> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). The statute requires that, "[d]uring the removal period, the Attorney General shall detain the alien." *Id.* § 1231(a)(2).

B. Background Of The Instant Case.

Petitioner Eusebio Guevara, a Honduran with Lawful Permanent Resident status, was placed into removal proceedings in 2004 when he returned from a trip abroad. (Pet. App. 1a.) He was charged with inadmissibility for having been convicted of a crime of moral turpitude. This charge was based on Guevara's convictions for shoplifting a pair of pants in 1991, and two counts of fourth-degree sexual assault (a misdemeanor) in 1996. (*Id.*) After hearing arguments from both parties, the IJ made a finding that Guevara was removable based on the misdemeanor sexual assault convictions. (Pet. App. 13a.)

The IJ then turned to Guevara's request for relief from removal under a now-repealed statute, 8 U.S.C. § 1182(c). (*Id.*) Guevara presented evidence in support of his petition, including letters attesting to his character, evidence of the dire situation in Honduras, and evidence that he was the sole provider for his wife and children in Honduras. (Pet. App. 16a.)

The IJ considered all of this evidence, and weighed the positive and negative factors for granting relief. The IJ first noted that Guevara's convictions weighed against relief (Pet. App. 17a), although the shoplifting offense carried minimal negative weight, in the IJ's eyes, because the value of the shoplifted item was small and it did not appear to be part of a larger pattern of theft. (*Id.*) Nevertheless, the IJ found that Guevara would "ha[ve] to show equities which rise to a fairly significant level in order to merit the granting of relief" because of the misdemeanor sexual-assault convictions. (Pet. App. 18a.)

The IJ then considered the positive equities in Guevara's favor. The IJ found several positive factors, including Guevara's 19-year presence in the United States, his 14-year period as a permanent resident, and his solid work history. (*Id.*) The IJ also found that sending Guevara back to Honduras would have negative economic consequences for his family. (*Id.*) Additionally, in light of Guevara's law-abiding conduct in the eight years since his most recent conviction, the IJ found that rehabilitation was a positive factor. (Pet. App. 19a.) The IJ noted that Guevara had expressed remorse for his convictions, had not been arrested or charged with any offenses for eight years, had altered his life during those eight years, and had "been reformed so that . . . future criminal misconduct is unlikely." (*Id.*)

Balancing these positive and negative factors, and finding that the positive ones outweighed the negative ones, the IJ granted Guevara relief from removal. (Pet. App. 2a-3a.)

The government appealed the IJ's decision to the BIA. The BIA agreed with the IJ that Guevara was statutorily eligible for relief from removal under 8 U.S.C. § 1182(c). (Pet. App. 11a.) It disagreed, however, with how the IJ had weighed the positive and negative equities in deciding to award that relief. (*Id.*) The BIA therefore sustained the government's appeal. (*Id.*) It concluded its opinion with the following order: "The respondent is ordered removed from the United States to Honduras." (*Id.*)

C. The Court of Appeals' Decision

Guevara then petitioned for review of the BIA's decision in the United States Court of Appeals for the Seventh Circuit. He argued that under the current statutory and regulatory scheme, the BIA lacked the power to order him removed from the country, as it had done, when the IJ had entered no such order in the first instance. (Pet. App. 6a.) Acknowledging that its ruling was in direct conflict with the Ninth Circuit, the court nonetheless affirmed the BIA's order. (Pet. App. 7a.)

The Seventh Circuit's analysis focused on the statutory definition of "order of deportation" found in 8 U.S.C. § 1101(a)(47)(A), which defines the term as "the order of [the IJ] . . . *concluding that the alien is deportable* or ordering deportation" (emphasis added). (*Id.*) The court recognized that the IJ had not ordered Guevara removed from the United States, but instead, had issued an order granting him relief from removal. (Pet. App. 8a.) But the Seventh Circuit reasoned that the IJ found that Guevara was removable before granting relief from removal, and that former finding was itself an "order of deportation." (Pet. App. 7a-8a.) Accordingly, the court ruled that the BIA had merely affirmed the IJ's "order of deportation," while reversing its grant of relief from removal. *Id.* As the court put it:

> In Guevara's case, the IJ initially determined that Guevara was removable for having committed a crime involving moral turpitude. Pursuant to 8 U.S.C. § 1101(47)(A), this threshold determination constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that Guevara was entitled to a discretionary waiver of removal . . . . In other words the BIA rejected only the waiver determination in the IJ's decision, leaving the IJ's first holding—that of removability—intact. The BIA was thus empowered to order Guevara removed to Honduras.

(Pet. App. 8a.) The court thus denied Guevara's petition for review. (*Id.*)

REASONS FOR GRANTING THE WRIT

The question presented in this petition is both important and likely to recur. *See, e.g.*, Petition for Writ of Certiorari, *Lazo v. Gonzales*, No. 06-935 (Dec. 29, 2006), *available at* 2006 WL 3877338. This Court should grant this petition, and resolve the question, for three basic reasons:

First, the Seventh Circuit's decision exacerbates an entrenched and persistent split among the Courts of Appeals

on a basic question of how to administer removal cases. The central question of what part of the administrative immigration apparatus has the power to effect removal of an alien from the United States is, by itself, of crucial importance. "The liberty interests involved in removal proceedings are of the highest order." *Lanza*, 389 F.3d at 927. Accordingly, as both Congress and the Executive Branch have recognized, an alien should be able to know whether, following entry of an order in his case, he may stay or he must go. 8 U.S.C. § 1229a(c)(5) (requiring that "[i]f the [IJ] decides that the alien is removable and orders the alien to be removed" the IJ must "inform the alien," *inter alia*, of "the consequences for failure to depart under the order of removal, including civil and criminal penalties"); 8 C.F.R. § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . . ."). The answer to that question should not depend upon the happenstance of where an alien's removal proceedings happen to take place. Nor is remanding to the IJ to enter an order of deportation just a matter of form. Where removability is found, multiple kinds of relief from removal are requested, and where one form of relief is clearly appropriate, an IJ might simply award that and not rule on the others. Where the BIA later overrules such a grant of relief, the IJ should be given the opportunity to reach other forms of relief requested. The logic of the majority rule, however, could be read to prevent that.

Second, the majority rule—which the Seventh Circuit adopted—cannot be squared with the statutory and regulatory scheme that governs the processing of removal cases. That scheme makes clear delineations between the relative competence of IJs, on the one hand, and the BIA, on the other. The BIA, an appellate body, has no legitimate authority in that scheme to enter an order of deportation in the first instance. Nor is it a response to say, as the Seventh Circuit did, that in reversing an order of an IJ allowing an

alien to *remain* in the United States, the BIA is actually affirming an "order of deportation," simply because an IJ found an alien to be removable before deciding that the alien should *not* be deported. Equating an order refusing to deport an alien with an "order of deportation" not only strains the limits of language, but also creates irreconcilable tensions with the statutory and regulatory immigration scheme as a whole.

Third, the issue, and the logic of the majority rule, also threaten broader practical ramifications for an already overtaxed immigration system. Entry of an "order of deportation" triggers appeal deadlines. Under the rule that prevails in the Ninth Circuit (which adjudicated nearly half of all petitions for review of BIA decisions in the year 2006),[2] an "order of deportation" describes only an IJ's order that an alien be removed. Such an order can only be entered by an IJ after the IJ decides both the question of removability and any claims for relief from removal. Accordingly, in the Ninth Circuit, an alien may safely wait until the end of proceedings before the IJ to begin the appeals process. In contrast, the rule that now prevails in the Second, Fifth, Seventh, and Eighth Circuits (which together adjudicated nearly one third of all petitions for review of BIA decisions in the year 2006)[3] holds that an IJ's traditionally threshold determination that an alien is removable is, by itself, an "order of deportation." Therefore, thousands of aliens whose cases arise in circuits following the majority rule could be required to appeal to the BIA immediately upon an IJ's finding of removability—regardless whether the IJ

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[2] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2006) at Table B-3, *available at* http://www.uscourts.gov/judbus2006/contents.html (last visited April 6, 2007).

[3] *See id.*

ultimately orders the alien removed—lest they waive their right to BIA (and eventually Article III) appellate review. The logic of the majority rule thus threatens to encourage piecemeal appeals to an already backlogged BIA, not to mention exacerbate an already overwhelming flow of petitions for review of BIA orders filed in the U.S. Courts of Appeals.

By reversing the Seventh Circuit, the Court can bring clarity to the question of which entity within the administrative immigration scheme has the power to order an alien removed. By doing so, the Court will simultaneously eliminate the potential for a myriad of unnecessary piecemeal appeals per year.

I. THE OPINION BELOW DEEPENS AN INTRACTABLE SPLIT AMONG THE CIRCUITS.

As the Seventh Circuit acknowledged in its opinion, its holding conflicts with decisions of the Ninth Circuit, but aligns with the rule which governs in the Second, Fifth, and Eighth Circuits. The opinion thus exacerbates an already entrenched and square circuit split on the question of the proper interpretation of the term "order of deportation" under 8 U.S.C. § 1101(a)(47)(A).

The Ninth Circuit was the first Court of Appeals to weigh in on the question. In *Molina-Camacho v. Ashcroft,* 393 F.3d 937 (9th Cir. 2004), that court held that, where an IJ has found an alien removable but granted relief from removal, and the BIA affirms the finding of removability but reverses the grant of relief, the BIA may not itself order removal of the alien, but must instead remand the case for the IJ to make that judgment and order.

In *Molina-Camacho*, as in this case, the IJ found the petitioner removable but granted discretionary relief from removal. The BIA affirmed the former finding, but reversed the grant of relief. 393 F.3d at 938-39. The BIA ordered the petitioner removed to Mexico. On appeal, the Ninth Circuit held that the BIA does not have the authority to order an

alien deported after reversing an IJ's grant of relief from removal. *Id.* at 941.

The court came to this conclusion based on the statutes and regulations delineating the respective powers of IJs, on one hand, and the BIA, on the other. The court began by examining the statutory definition of "order of deportation," noting that the statute defines an "order of deportation" as being an order entered "*by a special inquiry officer* [the former term for IJ]," not the BIA. *Id.* at 940. Thus, the plain text of the definitional statute itself indicates that the IJ, and not the BIA, is the proper official to enter an "order of deportation."

The court drew support for this conclusion from the regulatory scheme established to administer removal cases. The court observed that "nothing in the regulations enumerating the powers of the BIA indicates that the scope of those powers goes beyond appellate review of [IJ]s' decisions and other 'administrative adjudications.'" *Id.* (citing 8 C.F.R. § 1003.1(d)(1), and § 1003.1(b)(2)). The lack of regulatory authority for the BIA to issue orders of removal, however, stands in stark contrast to the clear and extensive regulatory authority of IJs to do so. 393 F.3d at 940-41 (citing 8 C.F.R. § 1240.1(a)(1)(i) (granting the IJ authority to issue order of removal); *id.* § 1240.12(c) ("The order of the [IJ] shall direct the respondent's removal from the United States, or the termination of the proceedings, or such other disposition of the case as may be appropriate."); *id.* § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . ."); *id.* at § 1241.1 (explaining when "[a]n order of removal *made by the immigration judge* . . . shall become final") (emphasis added).)

For its part, the government pointed to a different portion of the definition of "order of deportation," noting that the definition extends to orders "concluding that the alien is

deportable *or* ordering deportation." *Molina-Camacho*, 393 F.3d at 940 (citing 8 U.S.C. § 1101(a)(47)(A)) (emphasis added). Based on this language, the government argued that "a finding [by an IJ] that an applicant is removable . . . is essentially equivalent to an 'order' of removability." *Id.* at 941. Because the IJ made such a finding before proceeding to grant relief from removal, the government argued, the effect of the BIA's decision was to reverse the grant of relief, but affirm the finding of removability, and thus, leave in place the "order of deportation" already entered by the IJ. *Id.*

The court, however was unpersuaded. It reasoned: "[a]ccepting the Government's interpretation of the interplay between a finding of removability and an actual order of removal would render the IJ's discretionary ability to literally 'cancel removal' meaningless, because a finding of removability in the first instance is a prerequisite to such relief." *Id.* (citing 8 U.S.C. § 1229b(b)(1)). The court added that the Government's argument was flawed "because it conflated the BIA's uncontested *substantive* power to reverse a finding of removability or eligibility for cancellation of removal with the *procedural* power to issue the order of removal that results from such a reversal." *Id.* The court also noted that the government was unable to point the court to any statutory authority or case law to "support [] the assertion that a finding that a petitioner is removable is the same thing as an order of removal." *Id.* Accordingly, the court concluded "that the BIA acted *ultra vires* in issuing a deportation order instead of remanding to the IJ"—rendering "that portion of the proceedings a legal nullity." *Id.* (internal quotation marks omitted).

The Eighth Circuit was next to address the question, reaching the opposite conclusion, in *Solano-Chicas v. Gonzales*, 440 F.3d 1050 (2006). Although the court acknowledged that the Ninth Circuit had been presented with "precisely the situation" before it, namely whether the BIA

could itself order an alien removed after reversing an IJ's grant of discretionary relief from removal, the Eighth Circuit "part[ed] ways with the Ninth Circuit" on the issue. *Id.* at 1053-54. The court began its analysis by noting that once a finding of removability has been made, an alien bears the burden of showing that he or she is eligible for relief from removal. *Id.* at 1054. From there, the court reasoned that if an alien failed to make that showing, "an order of removal is appropriately entered by the IJ, and becomes final, *inter alia*, upon an order from the BIA affirming the IJ's order." *Id.* Further, the court ruled that where the BIA reverses the IJ's order granting relief from removal, the BIA "gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal." *Id.* The court never directly equated a finding of removability with an order of deportation, but instead appeared to be motivated primarily by efficiency concerns. In the sentence immediately following its holding, the court stated: "It would be an imprudent expenditure of resources to require that the case nonetheless be remanded to the IJ for an actual order of removability to be entered." *Id.*

The court also believed the result of its holding to be "consistent with the intent of the Attorney General," as shown by a then-recent amendment to immigration regulations. The amendment forbade the BIA from "issu[ing] any decision affirming or granting to an alien an immigration status, relief, or protection from removal, or other immigration benefit . . . that requires completion of identity, law enforcement, or security investigations if" those investigations have not been completed, are no longer current, or have uncovered relevant information bearing on the alien's application. *Id.* (quoting 8 C.F.R. § 1003.1(d)(6)(i)) (internal quotation marks and emphasis omitted). Without discussing the regulations that affirmatively delineate the powers of the BIA, the Eighth Circuit declared that the recent amendment's language indicated that the BIA could itself *grant* relief to an alien.

The court thus concluded that the BIA's role "is not just one of merely affirming or reversing IJ decisions; it may order relief itself." *Id.* Accordingly, the court found it "entirely consistent that the BIA also may deny status and order an alien removed." *Id.* It affirmed the BIA's order removing the alien. *Id.* at 1056.

The Fifth and Second Circuits quickly lined up behind the Eighth Circuit in result, if not exactly in reasoning. In *Delgado-Reynua v. Gonzales*, 450 F.3d 596 (5th Cir. 2006), facing facts materially identical to the instant case, the Fifth Circuit joined the Eighth Circuit in concluding that the BIA "merely eliminated impediments to removal" when it reversed an IJ's grant of discretionary relief from removal and "effected the original removal order." *Id.* at 601 (internal quotation marks omitted). Unlike the Eighth Circuit, which focused primarily on efficiency concerns, the Fifth Circuit expressly relied on the statutory definition of "order of deportation" that extends the term to include "the order by the special inquiry officer . . . *concluding that the alien is deportable* or ordering deportation." *Id.* at 600 (quoting 8 U.S.C. § 1101(a)(47)). Based on that definition, the court ruled that "Delgado-Reynua was ordered removed from the United States in the first instance by the IJ . . . [and] [t]he BIA simply reinstated that determination[.]" *Id.* The court concluded, without elaboration, that its ruling "d[id] not offend the scope of the powers granted to the BIA by either Congress or the Attorney General." *Id.* at 601. The *Delgado-Reynua* court neither mentioned nor endorsed the Eighth Circuit's conclusion that the BIA could itself grant an alien relief.[4]

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[4] Indeed, the Fifth Circuit later rejected the government's argument that the BIA could itself order an alien removed when the IJ had not first found the alien removable. *See James v. Gonzales*, 464 F.3d 505, 514 (5th Cir. 2006) ("[T]he statutory framework of the INA conveys that only an IJ may enter an order of removal in the first instance.").

The Second Circuit reached the same conclusion in *Lazo v. Gonzales*, 462 F.3d 53 (2d Cir. 2006) (petition for certiorari, No. 06-935, filed Dec. 29, 2006). The Second Circuit agreed with the Fifth Circuit that the government's view—that the BIA did not exceed its authority by ordering aliens removed—was "compelled" by the statute's definition of "order of deportation." *Id.* at 54. The court ruled: "the statutory requirement of an order of removal is satisfied when . . . the IJ *either* orders removal or concludes that an alien is removable." *Id.* Thus, the court explained, the BIA merely "removed an impediment" to the IJ's *original* order of removal when it overturned the IJ's grant of relief. The *Lazo* court rejected *Molina-Camacho* because, the panel opined, that opinion "does not consider the statutory definition that equates a finding of removability with an order of removal." *Id.* at 55.

In the instant case, the Seventh Circuit cast its lot with the Second, Fifth, and Eighth Circuits, holding that the BIA may order an alien removed immediately when it reverses an IJ's grant of relief from removal. Specifically, the court concluded that the statutory definition of "order of deportation" meant that the IJ had entered an "order of deportation" when it found Guevara removable—an order that the BIA affirmed on appeal while at the same time reversing the IJ's grant of relief from removal. (Pet. App. 7a-8a.) In so doing, the court candidly acknowledged the existence of this irreconcilable and direct conflict: "Guevara cites a Ninth Circuit case holding that the BIA is restricted to affirming or reversing orders of removal, not issuing them in the first instance . . . But the Second, Fifth, and Eighth Circuits have held otherwise on this issue, and we agree with the conclusions of these circuits." (Pet. App. 7a.)

The conflict is thus squarely presented in this case, and is ripe for this Court's adjudication. Courts of appeals on both sides of the issue have carefully examined the relevant law, and have engaged a variety of interpretive tools to ascertain

the correct rule. Little would be gained from further percolation.

II. THE SEVENTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE STATUTORY AND REGULATORY SCHEME GOVERNING IMMIGRATION CASES.

Not only does the Seventh Circuit's opinion exacerbate a circuit split, it is also wrong because it is contrary to the language of the pertinent statutes and regulations.

To begin with, the BIA does not itself have the authority to enter an "order of deportation." The very statute defining that term clearly sets out who has the authority to enter such an order: "The term 'order of deportation' means the order of the special inquiry officer [now called the IJ], or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable . . . ." 8 U.S.C. § 1101(a)(47)(A). The statute thus puts the responsibility for entering such an order squarely in the IJ.

Nor is there any colorable argument that the BIA constitutes some "other . . . administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable." The BIA's limited powers are created by the Attorney General's regulations. Those powers do not include ordering aliens removed from the country. Although the BIA is permitted to *review* "judgments and all other issues in appeals from decisions of [IJ]s," 8 C.F.R. § 1003.1(d)(3)(ii), including "[d]ecisions of [IJ]s in removal proceedings," *id.* § 1003.1(b)(3), no regulation empowers the BIA to itself order an alien removed. To the contrary, by both statute and regulation, "[a]n [IJ] shall conduct proceedings to decide the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1); 8 C.F.R. § 1003.10 ("*Immigration judges* . . . shall exercise the powers and duties . . . regarding the conduct of . . . removal . . . .") (emphasis added); *see id.*

§ 1240.12(c) (granting the IJ the power to "direct [an alien's] removal"); *id.* § 1241.1 ("An order of removal *made by the immigration judge* . . . shall become final . . . [u]pon dismissal of an appeal by the [BIA] [or] . . . [u]pon expiration of the time allotted for an appeal if the respondent does not file an appeal within the time.") (emphasis added); *id.* § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . .").

Perhaps because the governing scheme places the authority to enter an "order of deportation" so squarely in the hands of IJs, and not the BIA, the Seventh Circuit rested its conclusion on a legal fiction that the BIA was not entering an "order of deportation" in its own right, but, instead, simply affirming an "order of deportation" already entered by the IJ. The argument focuses on a different part of the definition of "order of deportation," which states that the term includes orders of an IJ "concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). It posits that the IJ's finding of removability is an order "concluding that the alien is deportable," and thus itself an "order of deportation." Accordingly, the argument goes, where an IJ has found an alien removable but granted relief from removal—and the BIA affirms the former finding but reverses the later grant of relief—the BIA is actually just "giv[ing] effect" to "the IJ's first holding—that of removability . . . ." (Pet. App. 8a.) (internal quotation marks omitted). There are at least two principal problems with this approach.

First, as the Ninth Circuit pointed out, it "conflate[s] the BIA's uncontested *substantive* power to reverse a finding of removability or eligibility for cancellation of removal on appeal with the *procedural* power to issue the order of removal that results from such a reversal." *Molina-Camacho*, 393 F.3d at 941. This is no mere technicality; it is a crucial question of institutional competence. The IJ, like a trial court, enters a judgment that is reviewed by the BIA.

When the IJ's judgment is that an alien can stay in the United States, *i.e. not* be deported, it is difficult to understand how, on an appeal from that order, the BIA can "affirm" an "order of deportation."

To the contrary, the role of the BIA in such an instance is akin to a federal appellate court reviewing a district court's judgment granting one party's motion for summary judgment (analogous to the alien's request to stay in the country) and denying the other party's cross-motion for summary judgment (analogous to the government's request that the alien be removed). As a technical matter, only the loser of the granted motion for summary judgment has standing to appeal the grant of the motion. Yet, on that appeal, the court is free to rule that the cross-motion should have been granted. *First Nat'l Bank v. Lincoln Nat'l Life Ins. Co.*, 824 F.2d 277, 281 (3d Cir. 1987). Strikingly, though, where the appellate court so rules, it does not simply enter judgment in favor of the appellant (and cross-movant) on its own. Instead, it "remand[s] with directions that [the trial court] enter summary judgment for" for the appellant. *Id.* This is consistent with federal law, which does not permit an appellate court to enter a new judgment in the first instance, but instead requires "*remand*[*ing*] the cause and *direct*[*ing*] the entry of such appropriate judgment, decree, or order . . . " 28 U.S.C. § 2106 (emphases added).

Indeed, remand is perhaps even more necessary in the context of removal proceedings, because unlike cross-motions for summary judgment—where issues are joined and the trial court need merely pick which party's argument is correct—it is quite easy to imagine a situation in removal proceedings where the IJ had several reasons for his decision to allow the alien to stay in America, yet only reached one. Reaching every reason would be unnecessary if the IJ had already made a dispositive ruling. In such cases, the United States Courts of Appeals and this Court have been quick to recognize that remand is appropriate, so that the trial court can consider the remaining questions, especially if the

appellate court's ruling changes a portion of the trial court's analysis. *See, e.g.*, *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998) (noting "the general rule that an appellate mandate governs only that which was actually decided"); *see also Fountain v. Filson*, 336 U.S. 681, 683 (1949) ("One of the reasons for [our holding that an appellate court could not grant judgment notwithstanding the verdict when the losing party had not moved for that relief before the trial court] was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case.").

Second, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "a court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). The Seventh Circuit's approach violates this basic rule; equating a finding of removability with an order of deportation cannot be reconciled with the remainder of the statutory and regulatory immigration scheme.

For example, 8 U.S.C. § 1229a(c)(5) states that "[i]f the immigration judge decides that the alien is removable *and* orders him removed" (which itself confirms that a finding of removability and an order of removal are distinct), the IJ must "inform the alien of the right to appeal that decision and the consequences for failure to depart under the order of removal, including civil and criminal penalties" (emphasis added). This warning would make no sense if applied to a finding that an alien is removable, when the IJ expects to conduct further proceedings to determine whether the alien merits relief from removal. *See also* 8 C.F.R. § 1240.13(d) (requiring warnings regarding penalties for failure to depart when ordering an alien removed).

That a finding of removability and the entry of an order of removal are two separate things is further emphasized by 8 C.F.R. § 1240.12, which requires the decision of the IJ to "include a finding as to inadmissibility or deportability" and "conclude[] with the order of the [IJ]," *id.* § 1240.12(a)—and that the order of the IJ shall, where appropriate, "direct the respondent's removal from the United States," *id.* § 1240.12(c). Indeed, under 8 C.F.R. § 1240.12(d), "[w]hen [an alien] is ordered removed from the United States, the [IJ] shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made[.]" Of course, when an IJ has merely found an alien removable, but has granted relief from removal and is ordering that an alien may stay in the United States, the IJ would not specify a country to which to remove the alien.

In addition, as the Ninth Circuit recognized in the seminal case on this issue, "[a]ccepting the government's interpretation of the interplay between a finding of removability and an actual order of removal would render the IJ's discretionary ability to literally 'cancel removal' meaningless, because a finding of removability in the first instance is a prerequisite to such discretionary relief." *Molina-Camacho*, 393 F.3d at 941 (citing 8 U.S.C. § 1229b(b)(1)).

These inconsistencies can all be avoided very simply: by refusing to conflate the BIA's substantive power to reverse an IJ's finding that an alien is eligible for relief from removal with the procedural power to order an alien removed. *See id.* The Seventh Circuit's failure to do so renders its decision erroneous.

III. THE SEVENTH CIRCUIT'S OPINION THREATENS SUBSTANTIAL CONFUSION REGARDING THE PROPER APPELLATE PROCEDURE FOR IMMIGRATION CASES.

Finally, and perhaps most importantly, the logic of the Seventh Circuit's holding (and the majority rule) create the

potential for mass confusion and needless piecemeal proceedings in removal cases.

As set out above, a finding of removability is a threshold question, often conceded in removal cases at an early stage. Most often, the "action" in such cases centers on the separate question of relief from removal, which generally is adjudicated later—often much later. Removal Hearing Fact Sheet at 2; 8 C.F.R. 1240.48(a); *see also* SJ080 ALI-ABA at 218 (noting that a request for relief from removal generally requires a "separate 'merits' hearing").

If a simple finding of removability, without more, constitutes an "order of deportation," the right to appellate review by the BIA would attach instantly. The alien would have to appeal that order to the BIA or risk that order becoming a final order of deportation within 30 days. 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 1003.39. Two results are possible under such a scheme; neither is desirable.

First, aliens might fail to appeal the finding of removability, only to find out that, under the logic of the Seventh Circuit's approach, the earlier finding was actually an "order of deportation," which became final 30 days after entry when not appealed.[5] At a minimum, the alien could

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[5] In fact, there is currently some confusion in the United States Courts of Appeals regarding whether an immigration judgment is "final" and "exhausted," *i.e.*, reviewable in federal court, in cases where the BIA reverses a grant of discretionary removal but remands the case to the IJ.

The Eleventh Circuit's case in *Del Pilar v. United States Attorney General*, 326 F.3d 1154 (11th Cir. 2003), is one example of the confusion. In that case, an IJ found Del Pilar removable, then granted him a waiver of inadmissibility. The BIA reversed the IJ's grant of relief and remanded to the IJ for the limited purpose of allowing Del Pilar to designate a country of removal. *Id.* at 1156. Del Pilar appealed directly from the BIA to federal court. The government argued that the remand rendered the judgment non-final, stripping federal courts of jurisdiction. *Id.* The Eleventh Circuit disagreed, finding that despite the remand, the BIA order of removal was final and the court had jurisdiction to hear the

lose the right to BIA review of that order by not having timely appealed it. *See* 8 C.F.R. § 1003.38(b); *id.* § 1003.3(a)(1). But the result could be far worse: an alien could lose the opportunity to have the merits of his claim heard before being deported from the country. For, once the order of deportation becomes final, the alien is to be detained and removed within 90 days. 8 U.S.C. § 1231(a)(1), (2). Should a finding of removability be thus converted to a final order of removal for a legitimate refugee, under the majority rule's logic, this ambiguity in immigration procedure could become literally a matter of life and death, with neither BIA review, nor Article III review, nor even habeas corpus, available for an alien who falls victim to it. *See* 8 C.F.R. § 1003.3(a)(1); *id.* § 1003.39; 8 U.S.C. § 1252(d)(1) (Article III court may not consider immigration claims not first exhausted before the BIA); 8 U.S.C. § 1252(a)(5) (withdrawing habeas corpus review for "an order of removal").

Second, to avoid this result, aliens might wisely decide to appeal the preliminary finding of removability, even before

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case. *See also Perez-Vargas v. Gonzales*, 478 F.3d 191, 194 n.4 (4th Cir. 2007) ("The BIA's opinion, read as a whole, indicates that the remand to the IJ was for the purpose of determining whether Perez-Vargas is entitled to voluntary departure. In such circumstances, there is a final order of removal for purposes of appeal[.]"); *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (holding that court had jurisdiction, although alien appealed directly from a BIA decision that remanded the case to the IJ).

The confusion also extends to what precisely is required to exhaust administrative remedies. In *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005), the Third Circuit entertained an appeal after the IJ issued a final order on remand from the BIA. In so doing, the court rejected the government's argument that the petitioner had not exhausted his administrative remedies for failing to appeal the decision on remand to the BIA. *See also Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994) (rejecting government's argument that alien did not exhaust administrative remedies because he did not appeal to BIA after remand).

an IJ has decided whether they will be granted relief from removal. The result would be to inundate an already-deluged BIA with up to double the normal number of appeals in removal cases.[6] Such early appeals could potentially extend the time to adjudicate removal cases significantly; the IJ might lose the practical ability to proceed to the question of relief from removal, since federal regulations require that "[i]f an appeal is taken from a decision of an [IJ], the record of the proceeding shall be forwarded to the Board upon the request or the order of the Board." 8 C.F.R. § 1003.5(a).

Even if that problem could be remedied, such that IJ proceedings could continue after a preliminary BIA appeal, however, other problems arise. Many of these preliminary appeals could be mooted by an IJ's later grant of relief from removal. In such cases, the alien's time would be wasted in preparing and filing the premature appeal, the government's time would be wasted in responding to it, and the BIA's time would be wasted in administering it.

Alternatively, a later denial of such relief by an IJ (and concomitant order that the alien be removed) could give rise to a second appealable "order of deportation." Because the BIA has no mechanism to consolidate appeals comparable to that available in the federal circuit courts, *see* 8 U.S.C. § 1252(b)(6), the two appeals in one case would proceed on separate tracks to adjudication, potentially resulting inconsistent results—for example, where the first appeal is

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[6] At the end of Fiscal Year 2006, there were 27,918 pending cases before the BIA. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, UNITED STATES DEP'T OF JUSTICE, FY 2006 STATISTICAL YEARBOOK U1 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited April 6, 2007). Moreover, while the number of cases initiated with the BIA *increased* 14% from Fiscal Year 2002 to Fiscal Year 2006, the number of cases that the BIA completed *declined* by 12% in that same time period. *Id.* at S1.

affirmed, resulting in an order that an alien be removed, and the second appeal is reversed, resulting in an order that an alien be permitted to stay, or at least an order remanding the case for further proceedings. Two BIA rulings, in turn, could translate to two petitions for Article III review per case as well, exacerbating an already-crushing volume of petitions for review of BIA orders filed in the U.S. Courts of Appeals.[7]

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[7] As one commentator notes:

> Whereas the Second Circuit had rarely ever received more than thirty [petitions for review of BIA decisions] in any given month before 2002, filings began to rise dramatically that year. Between April 2002 and September 2005, the court received more than three times as many petitions for review of BIA decisions as it had received during the previous thirty years combined. Similar increases have been felt in courts of appeals around the country, with the heaviest volume in the Second and Ninth Circuits.

John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2007) (footnotes omitted). The commentator further notes that "[o]bservers generally agree that the surge is closely linked to recent procedural changes at the BIA, which substantially increased the volume of decisions reached by that tribunal, and led litigants to appeal those decisions at a higher rate." *Id.* at 15.

A simple calculation demonstrates the potential impact. The Ninth Circuit, which does not follow the majority rule encouraging duplicative appeals, currently handles approximately 49% of petitions for review of BIA decisions. *See, supra*, JUDICIAL BUSINESS OF THE UNITED STATES COURTS at Table B-3. These petitions comprise 40% of the court's caseload. *See id.* Put differently, they account for an average of over 225 cases, per active judge, per year. *See id.*; United States Court of Appeals for the Ninth Circuit, The Judges Of This Court In Order Of Seniority, *available at* http://www.ca9.uscourts.gov/ ca9/ Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f664 08825683c0058477e?OpenDocument (last visited April 6, 2007). If the court had to deal with twice the number of petitions for review of BIA decisions, those petitions alone would account for over 550 cases, per active judge, per year.

Again, all of these potentially adverse consequences could be averted by a simple ruling from this Court, clarifying that an "order of deportation" comes only from an IJ, and only when the IJ orders that an alien actually be removed. For these reasons, too, certiorari here is appropriate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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